CHAN SIEW GIM v. WILLIAM LEE

[O.C.J. (Yusoff Mohamed J.) November 14, 1979]
[Kuching — Civil Suit No. K. 120 of 1975]

Practice and Procedure — Order for recovery of possession — Dispute by personal representative of deceased defendant — Whether "Order" amounted to "Judgment" — Scope of R.S.C., O.47 r.2 — R.S.C. O.42, O.47 rr.1 & 2, O.54 r.1 — Rent Control Ordinance (Cap. 86), s. 18(c).

Landlord & Tenant — Licence — Order for recovery of possession — Judgment by consent — Dispute by personal representative of deceased defendant — Judgment binding on personal representative — No ground to show separate interest.

The plaintiff had obtained judgment to recover possession of the premises known as 96, Padungan Road, Kuching, by Order of Court. The said Judgment was entered by consent of the defendant's legal personal representative. The present *ex parte* application was for leave to issue writ of possession under R.S.C. O.47 rule 1. The first respondent, widow of the deceased defendant who acted as legal representative claimed that the order was not binding on her on the ground that she was not a party to the action.

Held, allowing the plaintiffs' application: (1) the first respondent could not blow hot and cold, admitting in one breath the premises was given out on licence to the defendant and consenting to judgment for possession by the plaintiff and in another breath denying that the judgment was binding on her; there was no ground to show how she derived her separate interest in the premises if she had any;

(2) an order for recovery of possession obtained by the plaintiff was a judgment;

(3) the purpose of notice in R.S.C. Order 47 rule 2 is to enable the persons in possession to apply for relief e.g. against forfeiture of lease if there has been any or otherwise. The intention is not to decide whether a triable issue has been raised which had already been dealt with before judgment or order was obtained;

(4) both respondents had no title to remain in possession of the premises; leave should therefore be granted for writ of possession to issue against both respondents.

Cases referred to:-

(1) *Yap Hong Thin* v. *Seenevasam* [1970] 1 M.L.J. 143.
(2) *Tan Joo Eng* v. *Siang Heng & Co. Ltd.* [1957] M.L.J. 18.

CIVIL SUIT.

Patrick Tan for the plaintiff/applicant.

K.C.I. Reddy for the defendants/respondents.

Yusoff Mohamed J.: This is an *ex parte* application for leave to issue writ of possession under Order 47 rule 1. I gave oral judgment and ordered that leave be granted in terms of application.

My grounds are as follows:

(1) The plaintiff had obtained judgment to recover possession of the premises known as 96, Padungan Road, Kuching, by order of court dated September 15, 1977 in CS/K.120/75 which judgment was entered by consent of the defendant's legal personal representative. The 1st respondent being the widow of the deceased defendant who acted as legal personal representative, cannot now deny that the order is binding on her on the ground that she is not a party to the action, as stated in paragraph 2 of her affidavit in opposition.

In my opinion, she cannot blow hot and cold, admitting in one breath the premises was given out on licence to defendant and consenting to judgment for possession by the plaintiff and in another breath denying that the judgment is binding on her. There is no ground showing how she derived her separate interest in the premises if she has any.

(2) It was contended that the application by Summons in Chambers is not regular by reason that Order 54 rule 1 Rules of Supreme Court limits such summons to pending cause or matter only.

This application is made in consequence of judgment obtained for recovery of possession and such possession has not been recovered without the issue of writ of possession now being applied and this, in my view, is a pending matter.

The decision in *Yap Hong Thin* v. *Seenevasam*[1] referred to by respondent's counsel has no relevance; that being a case dealing with application for recovery of possession of rent controlled premises and this is distinguishable from the present application which is for leave to issue writ of possession of licenced premises.

(3) Counsel for respondent also referred to Order 42 Rules of Supreme Court on execution of judgment and urged that there must be judgment before the issue of a writ of execution such as the writ of possession now applied.

An order for recovery of possession obtained by the plaintiff is in my opinion, a judgment. Upon proper reading both Order 42 and Order 47 Rules of Supreme Court, a judgment seems to include an order of the court.

(4) Respondent's counsel also contended that no notice of proceeding had been served on the respondents and that this is fatal to this application on the authority of *Tan Joo Eng* v. *Siang Heng & Co. Ltd.*[2]

Notice of proceedings as referred to in Order 47 rule 2 is vague. It may mean notice of judgment or order. The *Annual Practice (White Book) 1961* at 1142 under item "notice" it is specified that application must give the defendant notice of the judgment or order and call upon him to yield up possession. These notices had been served on both the respondents and consequent to these they filed the affidavits in opposition and the counsel retained following which this application has been argued extensively. In my considered opinion the respondents had been given sufficient notice to enable them to apply whatever relief they deemed necessary to the court, in compliance with rule 2 of Order 47 Rules of Supreme Court.

(5) The counsel for respondent next argued that the applicant's affidavit supporting the application is defective.

I do not agree with this. Paragraph 5 of the affidavit states the true facts and is not misleading as contended by the respondent's counsel. His argument that the order for recovery of possession was made against the estate and not the respondents and therefore not binding on them is a mere sham. In the original claim the defendant was not a protected tenant. The premises was not rent-controlled and the respondents did not

therefore derive any title to the premises and cannot claim to be in the same position as a statutory tenant.

The counsel also contended that the affidavit does not state the premises is rent-controlled. The basis of the original claim is that the premises was licenced to the defendant and this had been conceded and it is most unreasonable to suggest that the affidavit by applicant should state that the premises is rent-controlled just because the respondents now contend that it is so in their affidavit in opposition.

(6) Lastly, the respondent's counsel argued that there are triable issues as shown in the respondent's affidavit in opposition and the writ should not issue.

In my view, the purpose of notice in rule 2 of Order 47 of Rules of Supreme Court is to enable the persons in possession to apply for relief e.g. against forfeiture of lease if there has been any or otherwise. The intention is not to decide whether a triable issue has been raised which had already been dealt with before judgment or order was obtained.

(7) In my judgment the respondent's affidavit had no merit. As conceded by their counsel the affidavit merely consists of supposition that the premises was rent-controlled and that by virtue of section 18(c) of Rent Control Ordinance (Cap. 86) they become statutory tenants. As has been stated earlier both respondents have no title to remain in possession of the premises and in these circumstances leave was granted for writ of possession to issue against both respondents.

Application allowed.

Solicitors: *Yong & Co.; Reddy & Co.*

MARZUKI BIN MOKHTAR v. PUBLIC PROSECUTOR

[A.Cr.J. (Tan Chiaw Thong J.) January 16, 1979]
[Sibu — Criminal Appeal No. 7 of 1978]

Criminal Law and Procedure — Charge of possession of heroin — Ruling that there was a case to answer — Appeal against decision — Preliminary objection to appeal — Ruling not "judgment" or "order" — Scope of s. 307(1) of Criminal Procedure Code — Dangerous Drug Regulations, r. 6(3) — Criminal Procedure Code, ss. 173(f), 180 & 307(i).

The appellant in this case appealed against the decision of the lower court which ruled that there was a case for the appellant to answer on the charge for which he was tried after the submission by his learned counsel at the end of the case for the prosecution that there was no case to answer. The appellant was charged with having possessed a quantity of heroin, an offence under regulation 6(3) of the Dangerous Drug Regulations. At the outset the learned Deputy Public Prosecutor raised a preliminary objection to the appeal on the ground that the appeal was premature and did not fall within the ambit of section 307(i) of the Criminal Procedure Code.

Held: (1) a ruling made at the end of the case for the prosecution in a criminal trial that there is a case for the accused to answer on the charge or charges against him is not a judgment within the contemplation of section 307(i) of the Criminal Procedure Code;

(2) the word "judgment" in criminal proceedings indicates the final order in a trial terminating in the conviction or acquittal of the accused; therefore the instant appeal does not concern a judgment falling within the ambit of section 307(i) of the Criminal Procedure Code;

(3) the instant appeal had been brought prematurely and it was not competent for the court to deal with such appeal on its merits;

(4) the trial should continue from the stage where it left off, before the successor of the magistrate who initially heard the trial and who had since left the service;

Cases referred to:-

(1) *Public Prosecutor* v. *Hoo Chang Chwen* [1962] M.L.J. 284.

(2) *Public Prosecutor* v. *R.K. Menon & Anor.* [1978] 2 M.L.J. 152.

CRIMINAL APPEAL.

David Tiong for the appellant.

Mustapha Besar (Deputy Public Prosecutor) for the respondent.

Tan Chiaw Thong J.: This is an appeal against the decision of the lower court which ruled that there was a case for the appellant to answer on the charge for which he was tried by the lower court after the submission by his learned counsel at the end of the case for the prosecution that there was no case for him to answer. The appellant was charged with having possessed a quantity of heroin which was a dangerous drug without being authorised, an offence punishable under regulation 6(3) of the Dangerous Drug Regulations.

At the outset of this appeal the learned Deputy Public Prosecutor raised a preliminary objection to the appeal on the ground that the appeal, having been brought at the stage of proceedings before the lower court described above, is premature and in any event, that it is not such an appeal as falls within the ambit of section 307(i) of the Criminal Procedure Code. The relevant part of section 307(i) of the Criminal Procedure Code provides that any person who is dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against such judgment, sentence or order in respect of any error in law or in fact or on the ground of the alleged excessive severity or of the alleged inadequacy of any sentence. There is no question here of any sentence of the lower court being in issue since the trial has not been concluded. The question that falls for consideration is whether the instant appeal is one against a judgment or order of the lower court. In my opinion a ruling made at the end of the case for the prosecution in a criminal trial that there is a case for the accused to answer on the charge or charges against him is not a judgment within the contemplation of section 307(i) of the Criminal Procedure Code. In this connection, the word "judgment" is not defined in the Code but in the Commentaries on the Code of Criminal Procedure 1973 by *Sarkar*, in dealing with the matter of judgment in a trial under section 353 of the Indian Code of Criminal Procedure, it was stated at page 823 that the word "judgment" in criminal proceedings indicates the final order in a trial terminating in the conviction or acquittal of the accused. I would respectfully adopt the definition of